UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRISTAL USA, INC. and INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,	Case No. 08-CA-08-CA-200737

ICWUC'S MEMORANDUM IN OPPOSITION TO RESPONDENT CRISTAL USA, INC.'S MOTION FOR SUMMARY JUDGMENT REGARDING (WAREHOUSE UNIT) WITH SUPPORTING MEMORANDUM

Now come the Charging Party, the International Chemical Workers Union Council/UFCW (Union), and hereby files this Memorandum opposing Respondent Cristal USA, Inc.'s summary judgment motion for the reasons set forth below.

MEMORANDUM

A. Cristal's motion for summary judgment should be denied for the same reasons that Counsel for General Counsel's and/or the Union's pending summary judgment motions should be granted.

In support of its motion, the Union incorporates by reference and relies herein on the Counsel for General Counsel's memorandum supporting her earlier-filed, pending motion for summary judgment in this case, as well as the Union's earlier-filed memorandum supporting Counsel for General Counsel's motion for summary judgment in this case, as well as its memoranda supporting its own pending summary judgment motion in this case, which it incorporates by reference.

B. ***PCC Structurals***, the case primarily relied on by Cristal, should either be vacated, or overturned, and, therefore, not applied to this case.[1/]

The Union continues to rely on its motions for recusal filed earlier in this matter and incorporates by reference its memoranda (with attachments thereto) supporting those pending recusal motions**.** It emphasizes that Member Emanuel also should have recused himself from participation in ***PCC Structurals,*** *supra*, since he was on the amicus brief in the Sixth Circuit in ***Kindred Nursing Centers East, LLC v. NLRB***, 727 F.3d 552 (6th Cir. 2013), *enf'ing sub. nom*, ***Specialty Healthcare and Rehab. Ctr. of Mobile***, 357 NLRB No. 83 (2011). In that amicus brief, now-Member Emanuel and his then-law firm sought the reversal of ***Specialty Healthcare*** based on many of the same arguments relied on by the majority in ***PCC Structurals***. Just as he should recuse himself from this case, given his prior firm's continued representation of Respondent Cristal, he also should have recused himself in ***PCC Structurals*** in which his vote created the majority sufficient to overturn ***Specialty Healthcare***. Most disinterested observers would come to the same conclusion:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896, 80 S.Ct. 200, 4 L.Ed.2d 152 (1959)."

Cinderella Career & Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 591 (D.C.Cir. 1970).

By participating in ***PCC Structurals***, Member Emanuel was seeking to, and did, obtain, as a Board member, that which he was unable to obtain as a member of the Littler firm, *i.e.*, the reversal

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[1/] Unlike in ***PCC Structurals, Inc***., 365 NLRB No. 160 (2017), an RC case in which that union had no realistic means by which to appeal the Board's decision, the Union, here, in this CA case does have such an avenue for appeal.

of ***Specialty Healthcare***. Member Emanuel's participation on an amicus brief, seeking to overturn ***Specialty Healthcare,*** only more strongly suggests an appearance that he had pre-judged this legal issue. If he had been representing Specialty Healthcare, now known as Kindred Nursing Center on appeal, both before the Board and, then, on appeal, one might grant him the benefit of the doubt and assume that he was just representing the best interest of his client, an actual party to the proceeding. But he wasn't representing Specialty Healthcare at any level. There was no requirement that he continues to represent a client and, thus, advocate for overruling ***Specialty Healthcare***, when he participated *on an amicus brief on appeal* in *Kindred*. His participation, then, on behalf of an amicus, only strengthens the apparent appearance that, by advocating for ***Specialty Healthcare*** to be overturned, he had personally prejudged the legal issue. At least a "disinterested observer" readily could conclude that, "in some measure [he had pre] adjudged ... the law of a particular case in advance of hearing." ***Cinderella Career***, *supra*.

The actions by the majority in ***PCC Structurals*** -- a majority only with Member Emanuel's vote -- only emphasize this point. Despite the Petitioner in ***PCC Structurals*** having argued that ***PCC Structurals*** had waived its right to even seek the overturning of ***Specialty Healthcare***, *see*, "Opposition to Request for Review" at p. 2 in Case 19-RC-202188 (10/902017), as per NLRB Rule 102.66(d), one must search the majority's opinion to see whether they ever acknowledged, let alone decided, that waiver issue. Given the rapidity with which the Board reached its decision to overturn precedent upheld by eight (8) circuit courts, and for the reasons more fully explained by the dissent, coupled with Member Emanuel's past history on the issue, it does not appear that there was a deliberative mind at work, as opposed to a mind already made up. At least, that is likely what many disinterested observers would find, *i.e.*, that he should have recused himself in ***PCC Structurals***.

Member Emanuel's participation, as a Board member in ***PCC Structurals***, in the reversal of ***Specialty Healthcare*** – despite he and his firm having unsuccessfully sought, as an amicus, reversal of ***Specialty Healthcare*** in the 6th Circuit -- raises at a minimum an appearance of a conflict of interest and/or an appearance of bias. As such, just as in ***Hy-Brand***, *supra*, Member Emanuel should not have participated in the ***PCC Structurals***, or in this, case.

His participation, then, under such circumstances requires a vacating,[2/] or reversal, of ***PCC Structurals***, unless that decision is not applied here, as it should not be, as argued below. Consequently, for the reasons stated herein and in its pending recusal motion, the Board should not apply ***PCC Structurals*** to this case. *See*, ***Hy-Brand Industrial Contractors***, 366 NLRB No. 26 (2018).

C. The ***PCC Structurals*** decision should not be applied to this case.

The Union submits that ***PCC Structurals*** is not applicable here and should not be applied, retroactively, *or otherwise*, to this case. If Member Emanuel had recused himself from ***PCC Structurals***, as he should have, the decision in that case likely would have been 2-2 and, therefore, non-precedential.

More importantly, the underlying RC case in this matter, Cristal USA, Inc, 365 NLRB No. 74 (2017), may not be re-litigated in this CA case. *See*, NLRB Rule 102.67(g).

NLRB Rule 102.67(g) provides:

> "(g) *Finality; waiver; denial of request*. The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have

[2/] ***PCC Structurals*** also should be reversed for the reasons stated by the dissenting opinion in that case.

> been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Other than the Board's decision, itself, in ***PCC Structurals***, all of the issues raised by Cristal in its motion were, or could have been, raised in its request for review and in its subsequent motion for reconsideration in the underlying RC case here. Once the RC case is closed, the unit determination is, and should be, final and not subject to relitigation, ***just as the Rule provides***, absent an adverse court ruling. Unlike NLRB Rule 103.30, which specifically provides for exceptions in "extraordinary circumstances," Rule 102.67(g) provides for ***no*** exception in "special," or "extraordinary," circumstances in ***closed*** RC cases.[3/] If the Board wants to provide an exception to the finality rule to allow for relitigation of an RC unit determination, as Cristal seeks here, it knows how to do so by rule, but it must follow the proper notice and other requirements of the Administrative Procedures Act to amend the Rule. *See*, 29 U.S.C. Section 156. That, it has not done. The Rule is crystal clear: It provides for no "special circumstances."

Cristal asserts that, despite this Rule providing for no exceptions, there are, in fact, two such exceptions: (1) newly-discovered, previously unavailable evidence; and (2) "special circumstances." Cristal does not allege that the first so-called exception applies, so the Union need not address that matter.

As to the second alleged exception for "special circumstances," Cristal only cites to ***Duke Univ.***, 311 N.L.R.B. 182 (1993); ***Heuer Int'l Trucks,*** 279 NLRB 127 (**1986**); ***Sub-Zero Freezer Co.,*** 271 NLRB 47 (1984). Significantly, all of these decisions pre-date the Board's adoption of Rule

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[3/] The Union recognizes that the General Counsel has suggested that, in *open* RC cases, the matter may be re-visited. Memorandum OM 18-05. The related RC case, however, is not an "open" case, nor does OM 18-05 address that issue.

102.67(g). Notably, the Board's final rule differed somewhat from the Ruled that it proposed. The Board in 2014 proposed:

> "(f) *Waiver; denial of request*. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Representation-Case Procedures, Proposed Rule, 79 FR 7318-01 (Feb. 6, 2014). Unlike the proposed Rule, however, the final Rule in its first sentence emphasized the finality of the Regional Director's actions, even changing the title of the provision to emphasize "***Finality***," as well as re-lettering the Subsection Rule from (f) to (g):

> "*Finality; waiver; denial of request*. The Regional Director's actions are final unless a request for review is granted...."

If the Board had wanted to codify any "special" or "exceptional " circumstances exception to this Rule, it easier could have done so, when it adopted this rule in 2014, just as it has provided an exception to NLRB Rule 103.30(a). Not only did it not adopt any exception, thus rejecting any argument that might be based on ***Duke Univ.***, ***Heuer***, or ***Sub-Zero***, it re-emphasized its position of finality in the revised, final rule. Consequently, whatever relevance those cases may have had previously, they no longer apply.

The Union notes that ***Duke Univ***. merely cites ***Heuer***, for the proposition that RC unit determinations might be re-litigable in CA cases, though Duke apparently never argued for those exceptions and, instead, had waived the issue. ***Duke Univ. v. NLRB***, 1994 WL 665124 (unpublished)(D.C. Cir. 1994). ***Sub-Zero*** dealt with violence that precluded the conduct of a free

and fair election, not a unit-scope issue. Further, Member Zimmerman's dissent in ***Sub-Zero Freezer*** strikes the current balance between the need for stability in labor issues and factors favoring reconsideration of issues:

> "The sole reason that relitigation is being permitted here is a change in the composition of the Board from the time the representation case was litigated to the time the test of certification occurred. Certainly the Act allows for shifts in the law when the composition of the Board changes, and undoubtedly Congress intended for the Board to respond to changing times and conditions. It is, therefore, inevitable that a certain degree of instability in Board law will arise as new Members enter into the decision-making process. At the same time, however, such changes undermine the goals stated by a long succession of Board Members of maximizing the voluntary settlement of cases and minimizing the litigation of labor disputes. Those goals call for giving due regard for both stability in the law and finality in litigation. Avoiding unnecessary instability and uncertainty is critical to the efficient administration of the Act."

Sub-Zero Freezer Co., 271 NLRB 47, 48 (1984). Member Zimmerman went on to emphasize:

> "Early in my tenure at the Board I took the position that factors favoring stability outweighed those favoring reconsideration of the issues in technical refusal-to-bargain cases. In *Bravos Oldsmobile*, 254 NLRB 1056 (1981), I found that selective application of the rule against relitigation of representation issues could cause far greater damage than that which might result if the representation matter was improperly decided. I decided that, in all unfair labor practice cases testing certification, I would not allow relitigation of the representation matters even if I had dissented on the underlying representation case or would have decided the case differently had I participated in it.
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> A great deal can be gained by applying this form of res judicata to the Board's processes. When changes in the Board occur, the parties could at least be certain that decisions already made at the representation level are final. The wisdom of this approach is particularly apparent here where there was a full hearing on the representation issue and a dissenting opinion which apparently sets forth what is now the view of the current Board. The reviewing court will have both the record in the hearing and the dissenting opinion before it for full consideration. In these circumstances, the Board would lose very little in applying the rule of res judicata and would contribute greatly to the orderly administration of the Act during a period of change."

Id. By adopting the current version of Board Rule 102.67(g), the Board effectively has adopted Member Zimmerman's approach of finality and the *res judicata*-type application of (closed) RC unit determinations.

Indeed, under the circumstances of this case, application of Rule 102.67(g) is particularly appropriate. Not only does the Rule provide for no exceptions, but the effective retroactive application of ***PCC Structurals*** to closed RC cases undermines one of the purposes of the Act, *i.e.*, promoting labor-management stability. When deciding whether to apply a new standard retroactively, the Board must either apply its decision retroactively to all cases, or to none. Applying ***PCC Structurals*** retroactively will not serve the purposes of the Act to stabilize labor-management relations, since that standard has been applied in many cases in the nearly six (6) years since ***Specialty Healthcare*** was decided, with presumably many subsequent labor-management negotiations, contracts, and related Board decisions being based on units determined under that standard. If eight (8) courts of appeal had put into question the ***Specialty Healthcare*** unit-determination guidelines, an argument to apply ***PCC Structurals*** retroactively might carry a little more weight. However, the ***Specialty Healthcare*** approach has been *approved* by eight (8) circuit courts of appeal. Both union and employer negotiators reasonably relied on that standard for years, when approaching unit-determination issues. To apply ***PCC Structurals*** retroactively in ***closed*** RC cases and, thus, possibly put into question many units decided with ***Specialty Healthcare*** in mind – whether the units were litigated, or decided through voluntary recognition -- will needlessly promote industrial strife, seriously interfere with labor-management relations, and fail to promote orderly procedures for preventing interference with rights provided for by the Act, all in violation of 29 U.S.C. §141, and/or fail to encourage the practice and procedure of collective-bargaining

and/or seriously interfere with the exercise by workers/employees of *their* full freedom of association, *self*-organization, and designation of representatives of *their* own choosing, in violation of not only 29 U.S.C.¶151, but also the First Amendment of the U.S. Constitution. The Act protects SELF-organization of THOSE employees, who seek to join together for their mutual aid and protection.

While the Union is unclear as to the status of bargaining at the unit involved in ***Specialty Healthcare/Kindred Nursing***, it is likely that, if applied retroactively, the decision in ***PCC Structurals*** could have a significantly-negative impact on labor-management relations at that unit and many other units, that have been established through various means, since the Sixth Circuit upheld ***Specialty Healthcare*** nearly five (5) years ago. Established units in closed RC cases should not be disturbed. NLRB Rule 102.67(g), properly recognizes this need.

Nevertheless, even if Member Emanuel appropriately participated in ***PCC Structurals*** and even if the Board might need to decide in other cases whether to apply ***PCC Structurals*** retroactively, the Board need not (and should not) decide the retroactivity question, *here,* particularly since the related RC case is now *closed*. NLRB Rule 102.67(g).

Further, in *this* case, the Employer failed to clearly or adequately preserve in its Statement of Position, p. 14, in the underlying RC case (SOP), as argued in the "Union's Response and Opposition to Cristal USA, Inc.'s Request for Review of the Regional Director's Decision and Direction of Election" in Case 08-RC-188482, that it was seeking a reversal of ***Specialty Healthcare***, primarily arguing that ***Specialty Healthcare*** had not been appropriately applied.[4/] Thus, Cristal may

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[4/] At best, Cristal only challenged ***Specialty Healthcare*** as violating Section 9(b) of the Act, not Section 9(c)(5). At most, Cristal argued in its SOP that the RD's unit-determination resulted in a violation of Section 9(c)(5), which arguably could occur even under ***PCC Stucturals***. That is not

not raise its argument now, including that the Regional Director violated Section 9(c)(5) of the Act in his DDE. ***Duke Univ***, 1994 WL 665124; ***Cook Inlet Tug & Barge, Inc***., 2014 WL 265834n.1, Case 19-RC-106498 (Order 01/23/2014).

Just as the Board accepts, on remand, an appellate court's unfavorable decision as the "law of the case," while continuing to maintain its position on an issue for future litigation, this Board need not decide in *this* case whether Member Emanuel should have recused himself from ***PCC Structurals***, so long as that decision is not applied here to disturb a unit twice effectively upheld by the Board in a now closed RC case. To do so will only unnecessarily provoke industrial strife.

Thus, given (a) that Member Emanuel should have recused himself in ***PCC Structurals*** (and should recuse himself in this case), (b) that NLRB Rule 102.67(g) provides for no exceptions to that rule on non-re-litigation, (c) that eight courts of appeal have approved the ***Specialty Healthcare*** standard, and, significantly (d) that the Employer failed to clearly or adequately preserve the issue, that it was seeking the whole-sale reversal of ***Specialty Healthcare,*** when it filed its SOP in the underlying RC case, *see*, NLRB Rule 102.66(d), the Board need not address and decide the retroactivity issue in *this* case. ***PCC Structurals*** simply should not apply, or be considered.

Nevertheless, if the Board applies ***PPC Structurals*** and overturns the RD's unit determinations, the Union is prepared to continued to challenge such an action.[5/]

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the same argument that ***Specialty Healthcare,*** itself, should be overturned. Nevertheless, since the Board's interpretation of the phrase, "in each case," in Section 9(b) of the Act in ***PCC Structurals*** over emphasizes and expands on the legislative meaning of that phrase, as interpreted by the Supreme Court in ***American Hospital Association v. NLRB***, 499 U.S. 606 (1991), it reasoning in that case is further suspect.

[5/] ***PCC Structurals***, contrary to the statute and the Constitution, elevates the interest of those employees, who have not chosen to engage in SELF-organization with the Petitioning employees, to a position over, or equal to, the interests of those employees, who have. Placing the included and

Based on the Employer's failure to clearly, adequately, and timely preserve any right to seek

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excluded employees on the same plane is not what the statute provides for, nor the federal Constitution allows. The freedom of association recognized in the First Amendment includes the freedom to exclude others from their group.

Excluding employees, who do not seek to be part of the unit, does not violate Section 157 or 158(a)(3) of the Act, since such an exclusion does not inhibit their ability to refrain from union activities. Nor would such exclusion inhibit the excluded employees, if they so wish, to later seek to be included within the unit, through an ***Armour-Globe*** election, or seek a separate unit, through a residual-unit proceeding, etc.

Thus, to the extent that ***PCC Structurals*** may be applicable, it must be reversed as inconsistent with the purposes of the Act and the Constitutional-protection of the freedom of association and First Amendment rights for the petitioning employees and their organization. Indeed, one of the weaknesses of the Board's analysis in ***PCC Structurals*** is its failure to interpret Section 9(b) of the Act with the constitutional implications in mind, similar to how a Texas court failed to take into account union adherents' First Amendment rights:

> "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' Thornhill v. Alabama, 310 U.S. 88, 102, 103, 60 S.Ct. 736, 744, 84 L.Ed. 1093; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 57 S.Ct. 857, 862, 81 L.Ed. 1229. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances."

Thomas v. Collins, 323 U.S. 516, 532 (1945). The Board failed to take into account the constitutional *associational* rights of the Petitioning employees to decide who they wished to join with them for bargaining purposes and who they did not. By placing both groups of employees on the same plane, particularly at the ***employer's*** request – not at the excluded employees' request – the Board in applying ***PCC Structurals*** here risks serious interference with the Petitioning employees' First Amendment associational rights. The Board's failure to consider those rights undermines its analyses and decision in ***PCC Structurals***, while its decision in ***Specialty Healthcare*** properly strikes the associational balance between the petitioning employees and the excluded employees.

reversal of ***Specialty Healthcare***, as well as on Rule 102.67(g), the Board should not, and need not, disturb its earlier RC unit decision. While not necessarily controlling, the petitioning employees' statutory and constitutional associational rights may, and should, be given strong consideration above and beyond the interests of non-petitioning employees, unless the excluded employees have an overwhelming interest in being included. That approach strikes the proper associational balance.

The previously-determined warehouse unit has been determined appropriate in a now-closed RC case. The Employer, in this "test of cert" case, is relying solely on *its* challenge to that unit to defend against its admitted refusal to recognize and bargain with the certified representative, including failing to provide presumptively-relevant information. No excluded employees have complained!

Even if the Board should choose to re-consider the appropriateness of that unit under ***PCC Structurals***, the warehouse unit meets that test. *See*, "Union's Response and Opposition to Cristal USA, Inc.'s Request for Review of the Regional Director's Decision and Direction fo Election" and its subsequent opposition to Cristal's motion for reconsideration in Case 08-RC-188482.

Significantly, in both its RFR and related motion for reconsideration, Cristal ignored the highly significant fact that the warehouse employees, who are in a separate department from the production and maintenance employees, have a completely separate chain-of-commend, including for disciplinary matters, all the way up to the corporate level (DDE, p. 12) with their own distinct wage scale. (DDE, pp. 11-13). For these two (2) reasons alone, the unit is appropriate under either

standard.[6/] Little is more important to employees than who disciplines them and who decides their wages.

For the further reasons stated herein, the Charging Party hereby requests that Cristal's motion be denied and that the Union's and General Counsel's motions for summary judgment be granted.

[6/] While the Board need not (and should not) re-visit the warehouse-unit issue in this case, the Union submits that, even under the ***PCC Structurals*** standard, the Regional Director's approval of the petitioned-for warehouse unit was appropriate. Contrary to Cristal's arguments, the RD effectively did determine that the warehouse employees had "sufficiently distinct" interests from those of other, excluded employees, to warrant establishment of their own separate unit. Among other things, the excluded employees require greater skills and specialized training specific to producing chemicals; the North Plant production employees' contact with the South plant production employees is very limited and sporadic at best; the maintenance and production employees have different skills and training requirements and entirely different chains of command from the warehouse employees, whose disciplinary issues are determined, even at the corporate level, separate from the production and maintenance employees; the North and South production employees are separately supervised on a day-to-day basis; the Operations Manager, who had responsibility over both plants, had little knowledge about the differing local vacation, on-call, and overtime policies between the North and South Plant production employees, both of which are separately supervised. (DDE, pp 11-13)(Plant DDE, pp. 10-13). Significantly, even Cristal's own, main witness admitted that, while the North Plant production employees produce TiCl4, the South Plant employees do not produce TiCl4, nor do they use, nor are they trained on, the admittedly "unique" equipment used by the North Plant production employees at the North Plant. (RC transcript in **Cristal I** at pp. 107, 154-54, a copy of said transcript being filed also in the **Cristal** warehouse RC case). Indeed, the RD found that there are "great distinctions between the duties of warehouse employees as compared to production and maintenance employees." Clearly, he found that the warehouse employees have a "sufficiently distinct" interest in having their own unit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2018, a copy of the foregoing was electronically filed using the Board's electronic filing system and served via email on:

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